IN THE SUPREME COURT OF THE STATE OF MONTANA

No.

COLE INGRAM, father of and as Personal Representative of the Estate of KAYLE INGRAM, COLE INGRAM individually and as father and next friend of CAPRI INGRAM, his minor daughter, JACKIE INGRAM, mother of Kayle Ingram, and MICHELLE INGRAM, stepmother of Kayle Ingram,

Petitioners.

v.

THE MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, and THE HONORABLE JOHN BROWN, PRESIDING JUDGE,

Respondents.

PETITION FOR WRIT OF SUPERVISORY CONTROL

Original proceeding arising from the Eighteenth Judicial District Court, Gallatin County, Cole Ingram, et al v. City of Bozeman et al, Cause No DV-07-250C.

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B. ORDER DENYING PLAINTIFFS IN LIMINE MOTION ON SPEED

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Under Rule 14 M.R.App.P., Plaintiffs petition the Court for a Writ of Supervisory Control to reverse two Orders of Montana's Eighteenth Judicial District Court, See Orders attached as Exhibits A-B.

I. STATEMENT OF THE FACTS

At approximately 5:30 p.m. on Tuesday, October 18, 2005, Kayle Ingram was a passenger in a vehicle being driven by David Cherry on North 19th Ave. in Bozeman, Montana. It was a 1984 Toyota Celica owned by David Cherry's aunt and uncle, with whom he was residing. Kayle Ingram had neither an ownership interest in that vehicle, nor did he operate the vehicle or have any right to control its use. He was simply a right front seat passenger and the only other person in the Toyota Celica other than the driver, David Cherry.

David Cherry was traveling in rush hour traffic in the east northbound lane of the two northbound lanes of North 19th Ave. The east northbound lane was closed ahead by construction barrels to divert the stream of traffic from the east northbound lane into the west northbound lane in a 35 mph construction zone. When rush hour traffic prevented David Cherry from readily merging into the west northbound lane, he accelerated to enter the stream of traffic being constricted and funneled into the west northbound lane. Immediately adjacent to the left of the west northbound lane was a

recently constructed 8 ½ inch (215 mm) unmountable raised concrete median. The Montana Department of Transportation Road Design Manual sets forth a maximum height for raised concrete medians of no more than 150 mm, or six inches. The Manual also sets forth a maximum speed adjacent to six inch medians of 70 kph (or approximately 45 mph). There is no safe speed set forth in the Manual on roadways adjacent to an 8 ½ inch median.

As the Cherry vehicle entered the west northbound lane from the pinched off east northbound lane, it made contact with the eight and one half (8 ½) inch unmountable median. The estimations of the Cherry vehicle's speed ranges from 40 mph to as much as 73 miles per hour. The undercarriage clearance of the little 1984 Celica was insufficient to successfully mount the unmountable median.

Following contact with the unmountable 8 ½ median, the Cherry vehicle was vaulted onto its left side over the median and slid diagonally, on the driver's side of the vehicle, in a northwesterly direction into oncoming southbound traffic. The Toyota then made contact with a southbound Silverado truck which sheared off the roof of the little Celica. As a result of the impact the Toyota's driver, David Cherry, was killed instantly, while the

passenger, Kayle Ingram, struggled to survive for several hours, ultimately dying in a helicopter enroute to Billings.

Through their insurer, the Cherry family settled with the personal representative of Kayle's Estate and received a release in return.

Thereafter, Kayle's Estate sued four defendants, the State of Montana Department of Transportation, the City of Bozeman, an engineering firm (Thomas Dean & Hoskins), and a construction company (JTL Group, now Knife River), inclusively for claims of negligent highway design and construction and infliction of emotional distress.

Various pretrial motions were filed by both sides including Defendants' Motion for Allocation of Fault and Collateral Source Offsets and a request that both Kayle Ingram and David Cherry's names appear on the verdict sheet for apportionment purposes. Plaintiffs opposed the request, maintaining that under Montana law the conduct of non-parties is inadmissible for liability apportionment purposes, as it violates plaintiffs' substantive due process rights. Plaintiffs in a separate motion in limine made substantially the same argument in an effort to prohibit defendants from having the jury consider the driving conduct of David Cherry, the deceased non-party, against Kayle Ingram in the Estate's civil claim.

Plaintiffs contended that to allow it would violate the plaintiffs' right to substantive due process.

In an Order dated, Friday April 30, 2010, and received on Monday, May 3, 2010, the District Court granted the defendants' motion to place the name of David Cherry on the verdict sheet and also allowed the defendants to present evidence of and to argue the driving conduct of David Cherry, a non-party, for apportionment liability purposes to the jury (Exhibit A). As the Court also ruled that the defendants had failed to establish any factual or legal grounds for apportioning liability to Kayle Ingram, the defendants' request for Kayle's name to appear on the verdict sheet for apportionment purposes was therefore denied. Thereafter, the District Court entered an Order dated May 3, 2010 and received May 4, 2010, denying plaintiffs' motion in limine which sought to prohibit the use of David Cherry's driving conduct for apportionment purposes (Exhibit B). However, the May 3, 2010 Order granted the plaintiff's motion to prohibit attributing David Cherry's negligence to Kayle Ingram.

A two week trial has been set to begin May 17, 2010, with out of state experts designated by both sides. It is a matter of urgency that the Montana Supreme Court decide the substantive constitutional issues presented herein

to prevent both a significant injustice to the plaintiffs as well as avoiding the spectre of two trials.

II. QUESTIONS PRESENTED

A. Did the District Court err in ruling that under Montana law and relevant Constitutional principles the defendants may present evidence of the conduct of a settled and released non-party under §27-1-703 M.C.A. for the purpose of apportioning liability to that non-party?

B. Did the post Plumb 1997 legislative amendment to §27-1-703 M.C.A. cure the constitutional deficiencies identified by this Court in Plumb?

III. SUMMARY OF THE ARGUMENT

This Court has repeatedly held in cases with facts and circumstances substantially similar if not identical to those in the in the instant case, that the conduct of a non-party is inadmissible for apportionment purposes. The admissibility of non-party conduct forces the plaintiff into an untenable and constitutionally impermissible position of not only prosecuting its own case

on behalf of its client, but forces the plaintiff to defend an adverse absent non-party, an empty chair/de facto defendant. See *Newville infra.*

The current version of §27-1-703 modified by the legislature in 1997 after, *Plumb v. Fourth Judicial Dist. Court, Missoula County* (1996) 279 Mont. 363, 927 P.2d 1011, remains constitutionally infirm because the modification undertaken by the legislature failed to cure the substantive due process deficiencies identified by Montana Supreme Court in *Plumb*. This Court has held that evidence of conduct of a non-party in personal injury cases only arises on the issue of a superseding intervening cause. Moreover, this Court has held that in highway design and construction cases driver negligence is not a superseding intervening cause since it is foreseeable as a matter of law. *Faulconbridge v. State*, 2006 MT 198, ¶ 81, 333 Mont. 186, ¶ 81, 142 P.3d 777, ¶ 81.

While specifically ruling on the one hand that David Cherry's conduct is prohibited from being attributable to Kayle, on the other hand the Court granted the defendants' request to argue David Cherry's driving conduct to the jury for apportionment purposes. The result is to allow the jury to consider what the Court said is prohibited.

Thus, the District Court's decision allows the defendants to claim the benefit of attributing blame to an unnamed non-party which not only violates

the plaintiffs' substantive due process rights, but also provides defendants with an unconscionable double benefit. Specifically, the defendants can seek an award reduction by the allocation of a percentage of fault by the jury to the non-party's conduct, while retaining the cumulative benefit of the dollar for dollar offset of any amount paid by the settling tortfeasor. Such a double barrel hit places plaintiffs under the sword of Damocles at trial as their ability to obtain a meaningful verdict hangs by a thread.

IV. ARGUMENT

Here, as in *Plumb*, when the District Court granted the defendants' motion to allow the allocation of fault to an unnamed third party based on §27-1-703 M.C.A., that was a determination by the District Court that the current version of the statute, amended in 1997, satisfied the Montana Supreme Court's "concerns about the assignment of fault to unnamed and unrepresented third persons." *Plumb*, at 371. The Montana Supreme Court has previously held that the constitutionality of §27-1-703 is an appropriate issue to be decided by supervisory control. *Id* at 370. The District Court's conclusion of law is reviewed de novo, to determine whether it is correct. *Id* at 371.

A. It is a violation of substantive due process to require the plaintiffs to both prosecute their own case and defend a released non-party, by allowing the defendants to bring in the conduct of that released non-party in order to decrease and/or eliminate defendants' liability.

The Montana Supreme Court has repeatedly held that requiring a plaintiff to defend a non- party while pursuing the prosecution of its own case is a violation of the substantive due process protections guaranteed in the Montana and U.S. Constitutions. *Plumb supra*, *Newville v. State, Dept. of Family Services*, (1994), 267 Mont. 237, 883 P.2d 793, *Cusenbary v. Mortensen* 1999 MT 221, 296 Mont. 25, 987 P.2d 351, *Faulconbridge v. State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777, and *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, 350 Mont. 538, 208 P.3d 836,

Only where the conduct of a non-party was an intervening superseding cause of the plaintiffs' injuries may their conduct even be considered. *Faulconbridge* at ¶ 81. To be sure, the *Faulconbridge* decision put to rest this issue when it held that driver negligence in highway design and construction cases was foreseeable as a matter of law. As the *Faulconbridge* Court put it, "[w]hat is true, as our case law illustrates, is that driver error is indeed to be anticipated by one responsible for roadway design and maintenance, and therefore cannot, as a matter of law, completely sever the

State's potential liability for its wrongful acts." *Faulconbridge,* ¶ 92. Consequently, in light of *Faulconbridge,* defendants do not and cannot claim that David Cherry's conduct was a superseding intervening cause as driver error is foreseeable as a matter of law.

1. Plaintiffs' substantive due process rights are trampled upon under the "blame them but not name them" approach.

Simply sending notice to an unnamed party of a defendant's intent to blame them but not name them as a party, does not cure the substantive due process violation which inures to the plaintiff when they are forced to defend a non-party as well as prosecute their own case. This is especially so where, as here, the non-party is deceased. Further, Montana law regarding the apportionment of negligence among tortfeasors does not allow the apportionment of negligence to a settled and released non-party who is impecunious and judgment-proof. *Cusenbary v. Mortensen*, 1999 MT 221, ¶ 57 and 62, 296 Mont. 25, ¶ 57 and 62, 987 P.2d 351, ¶ 57 and 62.

2. A conundrum arises when the driver's conduct <u>is not</u> to be attributed to the plaintiff passenger yet <u>is</u> to be considered by the jury for liability apportionment purposes.

As the defendants repeatedly argued below that the accident was entirely the fault of David Cherry, the District Court quickly and correctly concluded that Kayle Ingram in no way contributed to the accident. In fact, to the extent that the defendants even theoretically suggested that Kayle's conduct should be considered for apportionment purposes, the Court found that the defendants had abandoned such contention. However the problem arises by the Court's decision to allow David Cherry's conduct to be considered for apportionment purposes. Logically, if the Court's ruling is that David Cherry's conduct cannot be attributed to Kayle Ingram then the jury cannot consider David Cherry's conduct for apportionment purposes in Kayle's claims.

B. The post* Plumb *1997 legislative amendment to §27-1-703M.C.A., did not cure the constitutional deficiencies identified by this Court in* Plumb*, as a result the statute remains constitutionally deficient both on its face and as applied.

Preliminarily, this Court in *Newville* in 1994, found the 1987 version of §27-1-703 constitutionally deficient. The legislature then amended §27-1-703 in 1995. This Court then found that the 1995 version of §27-1-703 was also constitutionally deficient in *Plumb* in 1996. Thereafter, the legislature

offered a third version of §27-1-703, effective April 18, 1997. Exhibit C While that version has yet to be ruled upon, it's efficacy is squarely before the Court in this case.

In *Newville, supra* guardians of a minor sued the Montana Department of Family Services for negligence following infliction of severe injuries to the minor by her foster father. The jury apportioned its verdict with an allocation of 30% of fault against the Montana Department of Family Services, 35% against the non-party foster mother, and 35% against the non-party professional counselor who had settled with the plaintiffs prior to trial. On appeal, the plaintiff launched a constitutional attack on the 1987 version of 27-1-703 M.C.A., claiming inclusively, that in proving their claim plaintiffs were unconstitutionally burdened with the task of exonerating non-parties. The Court agreed , holding that "the allocation of percentages of liability to nonparties violates substantive due process as to the plaintiffs." *Newville* at 255.

The Court further noted that with no attorney representing the non-party's interest at trial, " it is ***possible*** that the application of percentage of negligence was higher than would have been appropriate had the facts as to her own case been presented by her own counsel." *Id* at 254, *emphasis supplied.* A further negative consequence to the plaintiffs from the lack of

safeguards in the statute, allowing allocation of fault to non-parties, arises where a party is found to be less than 50% negligent. Since, under Section §27-1-703 (5), M.C.A., "that party is liable for contribution only up to the percentage of negligence attributed to him." *Id.* This jeopardizes the integrity of the verdict since "if any party is unable to pay the full amount of the judgment against that party, there will then be an inability on the part of the plaintiffs to collect all damages. " *Id.*

Then, in *Plumb,* the Supreme Court considered the efficacy of the Legislature's 1995 statutory amendments to Section §27-1-703, generated as a result of the *Newville* decision. In *Plumb,* husband and wife sued a shopping mall for injuries sustained by the wife in a slip and fall resulting in numerous corrective surgeries. When the District Court granted the mall's motion to file an amended answer asserting a non-party defense based on the alleged negligence of the treating non-party physician, plaintiffs petitioned for supervisory control. After finding that any remedy available to plaintiffs by appeal would be inadequate and denial of a speedy remedy by supervisory control would be a denial of justice, the Supreme Court decided that the constitutionality of a statute permitting assertion of a non-party defense was an appropriate issue for supervisory control and accordingly granted the writ. The Supreme Court then held that the non-party defense

allowed under the amended 1995 version of Section §27-1-703 violated plaintiffs' substantive due process rights, as the 1995 amendments allowed apportionment of liability to parties unnamed in the lawsuit and who did not have the opportunity to appear and defend themselves. *Plumb,* at 379-380

In so holding, the Supreme Court said that "conspicuous by its absence from the 1995 amendments was any opportunity for an unnamed third person to appear and defend". *Id.* at 376. Even though the 1995 legislative amendment to §27-1-703, stated that a primary objective was the fair apportionment of liability, the Supreme Court in *Plumb* found that the legislature had failed to protect the substative due process right of plaintiffs. *Id.* In so holding, the Supreme Court clearly addressed how considering the acts of nonparties adversely affects the amount of any jury award.

> "The greater the degree of fault that is assigned to unnamed parties, the greater the reduction in the Plumbs' recovery. Yet without the opportunity to appear and defend themselves, nonparties are ***likely*** to be assigned a disproportionate share of liability, and the Plumbs recovery is ***likely*** to be reduced beyond the degree to which a third party would be found at fault if he, or she, or it actually had an opportunity to defend themselves." *Id.* 378 emphasis supplied

It is self evident that the Montana Supreme Court ,through the progression of its language, from *Newville ("possible")* to *Plumb ("likely")*, demonstrated the unquestionable substantive due process

prejudice that inures to the plaintiff when they are compelled to defend the empty chair. The constitutional deficiencies identified in §27-1-703 by the Montana Supreme Court in *Newville* and *Plumb* carry over into the 1997 amended version. Moreover, it is abundantly apparent that the procedural safeguards, such as they are, after post *Plumb* 1997 amendments, are meaningless where – as here – the settled non-party is deceased. More particularly, "giving the settled or released party an opportunity to intervene" , * * * "to defend against claims as affirmatively asserted, to be represented by an attorney, present a defense, participate in discovery, cross-examine witnesses, and appear as a witness for either party", cannot and will not happen where the unnamed party is deceased. *See Exhibit C*, p. 5

The 1997 version is ostensibly supposed to give "the claimant a reasonable opportunity to defend against the non- party defense, including the ability to "to add the non-party as an additional defendant in the action". Obviously, those prospective "procedural safeguards" avail a plaintiff little or nothing where the unnamed party is deceased. The bottom line is, whether a settled non-party is living or dead, a plaintiff is irreversibly prejudiced where he has to defend an empty chair.

As if this were not prejudicial enough to the plaintiff, the legislature in its 1997 amendments announced in the preamble that, "the Legislature believes

that the percent credit rule, rather than the dollar credit rule, more accurately reflects the basis for comparative negligence which apportions liability according to the percentage of individual negligence." (Exhibit C). Unfortunately, the collateral source statutory credit remains available to further reduce any award to a plaintiff by the amount paid by a settled non-party. This is after liability has been reduced at trial by the allocation of fault percentage to that same non-party. Thus while the legislature professed that it prefers the "percent credit rule" to the "dollar credit rule", the net effect is that under the 1997 amendment both the percent credit rule and the dollar credit rule would apply. This double barrel disadvantage is not rationally related to fairly apportioning liability in ***any*** case.

CONCLUSION

In the final analysis, the above referenced cases make it crystal clear that an admittedly innocent plaintiff is irreparably harmed by having to defend an empty chair. Moreover, the perfunctory efforts of the legislature in trying to cure such manifest injustice in its 1997 amendments to §27-1-703 MCA only compounded the harm to plaintiffs while providing a double benefit to defendants. That makes the most logical and most compelling course of action called for to remedy the rupture of the plaintiffs substantive due process rights the granting of this writ, posthaste.

Respectfully submitted,

DATED this 6th day of May, 2010.

By _____
COURTNEY LAWELLIN
Attorney for the Plaintiffs and Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) (b); of the Montana Rules of Appellate Procedure, I certify that this brief is printed with 14 point proportionally spaced Times New Roman font; is double spaced; Microsoft Word 2003, and is not more than 5,000 words, excluding Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

By _____
COURTNEY LAWELLIN

CERTIFICATE OF SERVICE

I hereby certify that I served a full, true and accurate copy of the foregoing document on the 14th day of May, 2010 to the following named person:

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